The Fight against Climate Change: What's at Stake at Copenhagen? Some Legal Perspectives

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4th International Conference on "Law in the Changing World"
Conference Paper for the Roundtable "Environmental Law in the Changing World"
Faculty of Law of the Thammasat University, Bangkok, 9 December 2009

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INTRODUCTION

From the 7th to the 18th of December 2009, the world revolves around Copenhagen, where States gather to negotiate the shape and content of the post-2012 legal regime on the fight against climate change. With a view to this event, in the last few months the international scene witnessed a bustle of diplomatic activity, marked by a series of tactical moves and shifts of tactics, grandiloquent posturing, proposals and counter-proposals, deadlocks, and the practice of buttoned—and un-buttoned—foil-play…

As it happens, stakes in Copenhagen are high: no less than the future of human beings' living conditions on planet Earth. The awareness of the scale of the impacts anthropogenic activities have on our environment has never been this strong before, nor the urgency to act. The successive assessment reports of the Intergovernmental Panel on Climate Change (IPCC) made that clear[2]. However, an organizational model framing the collective efforts which are necessary to deflect national policies toward climate-friendly, sustainable development

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[2] The Fourth Assessment Report, released in 2007, is divided into four parts: Working Group I Report, "The Physical Science Basis"; Working Group II Report, "Impacts, Adaptation and Vulnerability"; Working Group III Report, "Mitigation of Climate Change"; and the "AR4 Synthesis Report". They can be downloaded on the website of IPCC, at URL < http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm>.

remains to be negotiated for the post-2012 period. The legal form and content of climate change international cooperation are part of the many challenges which must be addressed. This conference paper intends to present a legal reading of some of the core issues which are being debated at Copenhagen.

Part I of this paper sets out to remind the key-stages of the development of a global climate change legal regime, from the adoption of the United Framework Convention on Climate Change (UNFCCC) in 1992 to the 2007 Bali Action Plan, acting as a roadmap for the negotiation of a post-2012 regime. Next parts explore, on the basis of the Bali Action Plan and in the framework of the Copenhagen Summit, four main legal issues which seem tightly intertwined: the negotiation and legal structure of (a) new agreement(s) (part II), the fate of the principle of common but differentiated responsibilities (part III), the outlines of a parallel negotiation track which could be offered through sectoral approaches (part IV) and verification & compliance control issues in relation with the Bali's "measurement, reporting and verification" approach (part V). Though this point will not be addressed in this paper, it must also be noted that the fight against climate change entails the adoption of measures which could infringe on the playground of the World Trade Organization disciplines, such as taxes, custom duties or else subventions. The relationship between WTO law and the mechanisms set up to fight climate change raises many legal concerns which are for the time being pushed in the background, waiting for the Copenhagen outcomes.

I. Setting the stage: From the adoption of the UNFCCC to a post-2012 instrument

The climate change international legal regime is based on what is undoubtedly the most sophisticated international conventional construction to date. In 1989, when climate

change was mentioned for the first time in a UN General Assembly resolution[3], governments like people had little understanding—if any—of the sheer magnitude of the problem. And yet, three years later, notwithstanding the lack of strong scientific evidence on the relationship between human activities and the pace of global warming at that time, the UNFCCC[4] was adopted. This international treaty, which counts 192 Parties, provides a comprehensive framework for cooperation, with an ambitious goal: the "*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner*"[5]. It also lays down the key-principles which govern the climate change legal regime: the global nature of the threat calls for the participation of all States in a collective response system but, as all States do not have the same responsibility in historical and current anthropogenic emissions, and economic and technical capabilities, they do not share the same burden in the reduction of greenhouse gas (GHG) emissions. In other words, they have common but differentiated responsibilities (CBDR), which entails that developed countries and countries with economies in transition, listed in Annex I of the UNFCCC, are to shoulder more responsibilities than developing, non-Annex I countries.

Nevertheless, many provisions remained to be developed in order to reach the UNFCCC objectives, in particular for industrialized countries which, under Article 4.2, had to aim at returning to their 1990 GHG emission levels at the end of the 90's. In addition, in 1995

[3] UNGA Res. 44/228, "United Nations Conference on Environment and Development", 22 December 1989.
[4] United Nations Convention on Climate Change, 9 May 1992, available at URL <http://unfccc.int/essential_background/convention/background/items/2853.php>. The UNFCCC entered into force on 21 March 1994.
[5] UNFCCC Article 2.

the IPCC released its second assessment report, the conclusions of which encouraged the launching of the negotiation of a protocol containing more stringent commitments on GHG emissions reduction. In 1997, after heated debates, the Kyoto Protocol[6] was signed. It provides for more precise and binding commitments, with quantified absolute GHG emissions reduction targets for Annex I Parties, for a first (2008-2012) commitment period. Its entry into force was delayed due mostly to the withdrawal of the United States (US) from the Protocol in March 2001. However, this same year, the UNFCCC Conference of the Parties (COP) adopted a set of decisions, the so-called "Bonn-Marrakech Agreements", which, by clarifying the detailed rules for the implementation of the Protocol, allowed the Protocol's ratification by Annex I countries and its entry into force in 2005.

The first commitment period comes to its end on 31 December 2012. At this date, the system of binding quantified emission reduction objectives (QEROs) set up by the Kyoto Protocol must be renewed[7], failing which the Kyoto mechanisms will collapse, including the carbon market, the joint implementation (JI) and the clean development mechanism (CDM). The UNFCCC will remain, but where the Kyoto Protocol commits Annex I countries to reduce their greenhouse gases emissions, the UNFCCC only urges them to do so. The Kyoto Protocol contains a provision (Article 3.9[8]) on the negotiation of subsequent commitment periods. Accordingly, a few months after its entry into force, an Ad-Hoc Working Group on

[6] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, available at URL <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.
[7] Note that the Kyoto Protocol contains no provision on its termination.
[8] Article 3.9: "*Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol, which shall be adopted in accordance with the provisions of Article 21, paragraph 7. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall initiate the consideration of such commitments at least seven years before the end of the first commitment period referred to in paragraph 1 above*".

Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) was created[9] and started considering further commitments. In parallel, under the UNFCCC a "Dialogue on Long-term Cooperative Action"[10] was initiated. Unlike the AWG-KP, the Dialogue concerned all Parties to the UNFCCC, but was not aimed at creating new commitments. It was terminated in Bali in 2007 and "replaced" with the Ad-Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) which mandate is to conduct the negotiating process under the UNFCCC[11]. Thus, two parallel negotiations fora exist.

The Bali Summit, held on the occasion of the 13th COP to the UNFCCC and the 3rd COP/MOP[12] to the Kyoto Protocol, materialized the launching of the negotiations toward a "Kyoto 2" or "Kyoto+" agreement which is to extend the GHG emissions reduction international system beyond 2012.

Negotiations toward a "Kyoto+" agreement take place in a different environment than the one which governed the adoption of the 1997 Kyoto Protocol and the 2001 Bonn-Marrakesh Agreements.

IPCC assessment reports made it clear human activities are responsible for the increasingly fast rate of global warming, poorest countries will be more vulnerable to it than rich countries and thus need to be assisted in their adaptation to climate change, the pace of which calls for more stringent measures to reduce GHG emissions than what was expected.

[9] Decision 1/CMP.1, "Consideration of Commitments for Subsequent Period for Parties Included in Annex I of the Convention under Article 3, Paragraph 9 of the Kyoto Protocol", Doc. FCCC/KP/CMP/2005/8/Add.1, 30 March 2006.
[10] Decision 1/CP.11, "Dialogue on Long-term Cooperative Action to Address Climate Change by Enhancing the Implementation of the Convention", Doc. FCCC/CP/2005/5/Add.1, 30 March 2006.
[11] 1/CP.13, "Bali Action Plan", Doc. FCCC/CP/2007/6/Add.1, 14 March 2008, paragraph 2.
[12] Conference of the Parties to the UNFCCC serving as the Meeting of the Parties to the Kyoto Protocol.

As for the Stern report[13], released in 2006, it shows that at medium term the economic costs of inactivity will be higher than those of proactive measures to reduce GHG emissions. The landscape of emitters evolved as well. Developing giants like China, India and Brazil are from now on major GHG emitters and are summoned to face up to their responsibilities.

It is also worth noting that there are substantial differences between the Berlin Mandate[14], which launched the process that lead to the adoption of the Kyoto Protocol, and the roadmap to a "Kyoto + agreement", the Bali Action Plan[15]. The Berlin Mandate was deeply rooted in the guiding principles of the UNFCCC, in particular the CBDR principle. Accordingly, the negotiating process aimed at setting quantified emissions reduction objectives for Annex I countries and did not consider the strengthening of non-Annex I Parties commitments. The binding nature of the outcome of the Berlin Mandate process was also specified: it was to be a "*Protocol or another legal instrument*". On the contrary, the Bali Action Plan potentially entails a reassessment of the UNFCCC and the Kyoto Protocol founding and functioning principles.

II. What is being negotiated? The potential forms of the Copenhagen outcome

Though earlier drafts of the Bali Action Plan mentioned the need to reach a "comprehensive agreement", this objective was discarded during final negotiations[16] and the

[13] N. Stern, *The Economics of Climate Change*, 2006, available at URL <http://www.hm-treasury.gov.uk/stern_review_report.htm>.
[14] Decision 1/CP.1, "The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up", Doc. FCCC/CP/1995/7/Add.1, 6 June 1995.
[15] Decision 1/CP.13, "Bali Action Plan", Doc. FCCC/CP/2007/6/Add.1, 14 March 2008.
[16] On this point see L. Rajamani, "From Berlin to Bali and Beyond: *Killing Kyoto Softly?*", *ICLQ*, vol. 57, October 2008, p. 918 and L. Rajamani, "Addressing the "Post-Kyoto" Stress Disorder: Reflections on the Emerging legal Architecture of the Climate Regime", *ICLQ*, vol. 58, October 2009, p. 807.

Bali Action Plan is the starting point of a process which aims at reaching "*an agreed outcome*"[17], thus leaving the form and legal nature of this outcome undetermined.

During the last negotiation rounds (meetings in Bangkok in October 2009 and Barcelona in November 2009), no consensus could be reached on the future of the Kyoto Protocol and on the level and forms of commitments Annex I and non-Annex I Parties would be bound to, and it became increasingly clear that the Copenhagen agreed outcome would not be an agreement (i.e. a binding legal instrument). As a result, the negotiation spearheads had to make do with the target of reaching a "politically binding agreement"[18] and are now expressing the hope that a treaty will be concluded by June 2010[19], that is, taking the Copenhagen outcome as a starting date, when expires the 6 month period provided for by both the UNFCCC and the Kyoto Protocol when negotiating the text of a new protocol to the UNFCCC or amendments to the UNFCCC or the Kyoto Protocol[20].

The concept of a "politically binding agreement" makes lawyers wonder. Beyond the obvious haziness of the notion, it leaves the question of the form the "politically binding agreement" will take open-ended. In this respect, and supposing the Parties reach a sufficient political deal, two outcomes can be envisaged: a COP decision or a Ministerial declaration.

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[17] Chapeau of the 1st paragraph of the Bali Action Plan.

[18] M. von Bülow, "World leaders: Legally binding treaty out of reach in Copenhagen", 16 November 2009, available at URL <http://en.cop15.dk/news/view+news?newsid=2599>; M. von Bülow, "UN: Climate treaty talks may go on for another year", 6 November 2009, available at URL <http://en.cop15.dk/news/view+news?newsid=2524>.

[19] M. Bom, "Yvo de Boer: Hope for treaty by June", 2 December 2009, available at URL <http://en.cop15.dk/news/view+news?newsid=2801>.

[20] UNFCCC Article 15.2 ("*The text of any proposed amendment to the Convention shall be communicated to the Parties by the secretariat at least six months before the meeting at which it is proposed for adoption*") and Article 17.2 ("*The text of any proposed protocol shall be communicated to the Parties by the secretariat at least six months before such a session*") and Kyoto Protocol Article 21.3 ("*The text of any proposed annex or amendment to an annex shall be communicated to the Parties by the secretariat at least six months before the meeting at which it is proposed for adoption*"). On the procedures for the adoption of a protocol, see L. Rajamani, "Addressing the "Post-Kyoto" Stress Disorder: Reflections on the Emerging legal Architecture of the Climate Regime", *ICLQ*, vol. 58, October 2009, pp. 811-817.

As regards COP decisions, Article 7 of the UNFCCC states that " *as the supreme body of this Convention,* [the COP] *shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention*". Therefore, COP decisions can enhance and develop the conventional regime, either by allowing the fleshing out of its obligation or by paving the way to the adoption of further commitments in additional binding treaties. That's how the Bonn-Marrakech agreements, ie Decision 5/CP.6[21], which clarifies the practical details of the implementation of the Kyoto Protocol, allowed the ratification of the Protocol by developed countries and its entry into force though its rejection by the United States[22], and how the Berlin Mandate, embodied in Decision 1/CP.1, lead to the adoption of the Kyoto Protocol. It is also in this way that the compliance control system of the Kyoto Protocol was set up[23]. As far as the COP decisions' legal status is concerned, they are adopted by consensus and they cannot be binding unless explicit consent of the Parties has been expressed[24], and the UNFCCC does not mention its COP can create binding obligations.

The adoption of a Ministerial declaration is another possibility. It would mean negotiators reached a sufficient consensus to be able to formulate "*principled expectations*" which are, as Lavanya Rajamani puts it, "*created by seriously negotiated international*

[21] Decision 5/CP.6,"The Bonn Agreements on the Implementation of the Buenos Aires Plan of Action", Doc. FCCC/CP/2001/5, 25 September 2001.
[22] See S. Maljean-Dubois, "La mise en route du Protocole de Kyoto à la Convention-cadre des Nations Unies sur les changements climatiques", *Annuaire Français de Droit International*, vol. LI, 2005, p. 435.
[23] Decision 24/CP.7, "Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol", Doc. FCCC/CP/2001/13/Add.3, 21 January 2002 and Decision 27/CMP.1, "Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol", Doc. FCCC/KP/CMP/2005/8/Add.3, 30 March 2006.
[24] J. Brunnée, "COPing with Consent: Law-Making under Multilateral Environmental Agreements", 15 *Leiden J. Int'l L*, 2002, pp. 1-52; R. Churchill & G. Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law", 94, Am. J. Int'l L., 2000, pp. 623-659; L. Rajamani, "Addressing the "Post-Kyoto" Stress Disorder: Reflections on the Emerging legal Architecture of the Climate Regime", *ICLQ*, vol. 58, October 2009, pp. 824-828.

instruments and therefore have an operational significance for those entities responsible for their making and maintenance, but are based as much on ethical considerations of good faith and on public morality as on strictly legal considerations"[25]. However, the political and legal impacts of Ministerial declarations may vary, depending on its capacity to gather the representatives of the different options together. A COP decision which is taken up in a Ministerial declaration, such as the 2002 Delhi Ministerial Declaration on Climate Change and Sustainable Development[26], signed by all Parties, obviously shows the will of the Parties to stress the importance they give to the text. At the other end of the spectrum, the risk that the Copenhagen summit results in several Ministerial declarations reflecting antagonist positions is far from being insignificant.

A COP decision or a Ministerial declaration which gathers sufficient consensus from Annex I and non-Annex I Parties can lead to the subsequent adoption of either a new treaty on climate change, amendments of the UNFCCC and the Kyoto Protocol, or else a combination of both.

Whatever forms the Copenhagen outcome takes on, the probability of reaching a "good" agreement lies in the first place in reconciling Annex I and non-Annex I Parties' expectations.

III. "Common but differentiated responsibilities" or "Clouds vs. firewalls"

[25] L. Rajamani, "The Copenhagen Agreed Outcome: Form, Shape & Influence", *CPR Climate Brief*, November 2009, p. 4.
[26] Decision 1/CP.8, Doc. FCCC/CP/2002/7/Add.1, 28 March 2003.

The whole international legal regime on the fight against climate change is based on a binary structure which derives from the founding principle of common but differentiated responsibilities, which premises can be found in article 3.1[27] of the UNFCCC. The debates over the ethics and meaning of the principle and the nature of the obligations which derive from it have been heavily commented and will not be discussed in this paper[28]. As far as the UNFCCC and the Kyoto Protocol are concerned, the CBDR principle entails that the countries listed in Annex I of the UNFCCC, because of their historical and current responsibility in anthropogenic climate change and also because of their higher state of economic development and technological capabilities, agree to be bound to and to comply with ambitious obligations on the reduction of GHG emissions (mitigation commitments). As for Non-Annex I Parties, they are required to follow a sustainable development approach and must prepare adaptation to climate change. In addition, Article 4.7 of the UNFCCC specifies that "*The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties*". Such a binary structure was a problem for some States; it partly accounts for the rejection of the Kyoto Protocol by the US. Given the fact that the financial and technological support coming from developed countries is so far much lower than what was expected by

[27] UNFCCC Article 3.1: "*The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof*".
[28] See in particular L. Rajamani, *Differential Treatment in International Environmental Law*, Oxford, Oxford University Press, 2006, 302 p.

non-Annex I Parties[29], that mitigation actions from Annex I Parties are far below what was expected, that some developing countries have become major emitters and that developing countries do not want to take on mitigation commitments which would hamper their economic development, it doesn't come as a surprise that the CBDR principle is a core issue in the negotiation of post-2012 commitments.

Moreover, the final wording of the Bali Action Plan calls the UNFCCC / Kyoto Protocol balance into question in many respects. One of the most prominent elements is the use of "developed country Parties" and "developing country Parties" instead of the usual "Annex I Party" and "Non-Annex I Party". There is nothing accidental about this terminological shift. Some countries wanted such a shift in order to re-open the negotiation on the categories of developed and developing countries and the matching commitments. For example, the United States refers to the CBDR principle[30] and points out the fact that notions such as "responsibilities" and "capabilities" evolve accordingly to the evolution of a country's situation within the world economy. On this basis, and considering that all major emitters contribute critically to the level of GHG emissions, the US proposed the obligation for all States to adopt "nationally appropriate mitigation actions" which should be "measurable, reportable and verifiable"[31]. The US is not the only one calling for a differentiation within the developing countries category: the European Union is favorable to a differentiation[32], and so is Japan[33]. The reason is fairly simple.

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[29] See E. Guérin & M. Wemaere, *Négociations climat. Compte-rendu de Barcelone*, Paris, IDDRI, 2009, pp. 7-8.
[30] Cf. *Views regarding the Work Programme for the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention taking into account the elements to be addressed by the group (Decision 1/CP.13)*, Submission from Parties, Doc. FCCC/AWGLCA/2008/MISC.1, 3 March 2008, pp. 85-87.
[31] On MRV, see below part V.
[32] "*The AWG-LCA should explore how such national mitigation actions by developing countries, in particular those from advanced developing countries and major emerging economies, could lead to a substantial deviation from baseline emissions by 2020 by developing countries, in line with the assessment of the IPCC*": Submission

The Bali Action Plan indeed recognizes that "*deep cuts in global emissions will be required to achieve the ultimate objective of the Convention and emphasiz*[es] *the urgency to address climate change as indicated in the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*"[34]. As it happens, the IPCC report prescribes drastic GHG emissions reductions for developed countries: -10 to -40% by 2020 and, by 2050, -40% to -95% below 1990 levels would be necessary to remain under the threshold of +2°C at the end of the century, but these cuts won't be sufficient unless "*developing country emissions* (…) *deviate below their projected baseline emissions within the next few decades*"[35]. In other words, if developing countries do not reduce their emissions as well, developed countries will have to reach much heavier targets. At the same time, developing countries suspect developed countries of brandishing the specter of the developing major emitters in order to drop the quantified binding reduction targets system, a suspicion which is in some respects justifiable.

Such an explosive conjunction of circumstances resulted in a deadlock during the negotiations which took place in Barcelona in early November 2009, centered on the cloud vs. firewall issue.

The cloud vs. firewall controversy originates from the wording and structure of the first paragraph of the Bali Action Plan, and in particular its sub-paragraph b) on mitigation, points (i) and (ii) which read as follows:

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by France on Behalf the European Community and Its Member States, 3rd session of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA 3), Accra, 21-27 August 2008, Doc. FCCC/AWGLCA/2008/MISC.2, 14 August 2008, p. 6. See also Council of the European Union, "EU position for the Copenhagen Climate Conference (7-18 December 2009)", Brussels, 21 October 2009, available at URL <http://register.consilium.europa.eu/pdf/en/09/st14/st14790.en09.pdf>.

[33] Ibid., pp. 15-16.

[34] Fourth paragraph of the preamble of the Bali Action Plan.

[35] "Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change", Technical Summary, pp. 39 and 90, and Chapter 13, p. 776.

"[The COP] *1. Decides to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session, by addressing, inter alia:* (…)

(b) Enhanced national/international action on mitigation of climate change, including, inter alia, consideration of:

(i) Measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, by all developed country Parties, while ensuring the comparability of efforts among them, taking into account differences in their national circumstances;

(ii) Nationally appropriate mitigation actions by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner;"

Some developed States, namely the US and, to a lesser extent, Canada, Japan and Australia, laid stress on the common elements and pointed out that points (i) and (ii) should be gathered under a same "cloud"[36]. The "cloud" philosophy is described in Non-paper 28, issued on the occasion of the Bangkok meeting in October 2009, which lists mitigation requirements for all Parties and significantly planes the Annex I / non-Annex I burden-sharing divide[37]. Developing countries fiercely opposed the cloud approach, stressing the differentiated aspect and claiming there is an impenetrable screen, a "firewall", between

[36] Lavanya Rajamani notes that the promoters of the cloud approach have themselves different views on what it should imply: "*Whilst Australia is seeking to extend "commitments" to a wider group of Parties, the US is seeking to extend "actions" to all Parties*"; L. Rajamani, "The "Cloud" over the Climate Negotiations: From Bangkok to Copenhagen and Beyond", *CPR Climate Brief*, October 2009, p. 3.

[37] Non-paper 28 is available at URL <http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/5012.php>.

paragraphs 1 b) (i) and 1 b) (ii)[38], the first being related to the *commitments* of developed countries and the second to mitigation *actions* of developing countries.

The controversy illustrates both the different interpretations that can be made of the CBDR principle and the struggle for or against a new balance in the rights and obligations of developed and developing Parties.

As regards developing countries, they are strongly in favor of the continuation of the Kyoto Protocol with a second commitment period comprising quantified, absolute emission targets in order to guarantee developed countries, given their historical and current responsibility in atmospheric emissions and their degree of economic and technological development, keep on being responsible for the most part of the mitigation effort. From this perspective, they demand in convergent terms that developed countries meet several conditions:

- the level of ambition is set by scientific data and evidence. Accordingly, "[m]*itigation commitments by developed country Parties as a group must be at the top of the range indicated by the IPCC in order to achieve the lowest stabilization levels assessed by the IPCC in its 4th assessment report. The aggregate number is for all developed country parties, regardless of whether they have ratified the Kyoto Protocol or not*"[39]. In addition, developed countries must reduce their GHG emissions according to the figures given by the IPCC, that is to say by at least 40% below 1990 levels by 2020[40];

[38] E. Guérin & M. Wemaere, *Négociations climat. Compte-rendu de Barcelone*, Paris, IDDRI, 2009, pp. 9-10.
[39] Algeria's submission on behalf the African Group, in "Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties", Part I, Doc. FCCC/AWGLCA/2009/MISC.4 (Part I), 19 May 2009, p. 12. Along the same line, see South Africa's submission, in "Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties", Part II, Doc. FCCC/AWGLCA/2009/MISC.4 (Part II), 19 May 2009, p. 95.
[40] See for example Algeria's submission on behalf the African Group, in "Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties", Part I, Doc.

- before discussing the terms and conditions of the adaptation actions developing countries will take, developed countries must make clear and firm propositions on their quantified emission reductions commitments[41];

- the Kyoto Protocol remains the reference point[42] and must not be either replaced or merged with a new agreement[43].

As regard developed countries, positions are somewhat more eclectic. Most of them seem favorable to the negotiation of a new agreement, which would, in varying degrees, draw on the Kyoto Protocol, as shown by the five drafts agreements submitted in June 2009—six months before COP 15—for communication to Parties[44]. It is no secret that the shape and content of this new agreement will be strongly conditioned to the extent of the concessions made in order to bring the US to join the movement[45]. On the one hand, in the event the US, the world's largest developed GHG emitter, should remain free of quantified emissions limitation and reduction objectives (QELROs), there is a real risk that many developed—and

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FCCC/AWGLCA/2009/MISC.4 (Part I), 19 May 2009, p. 12; China's submission in ibid., p. 63; Nicaragua's submission on behalf Guatemala, Dominican Republic, Honduras, Panama and Nicaragua, in "Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties", Part II, Doc. FCCC/AWGLCA/2009/MISC.4 (Part II), 19 May 2009, p. 38.

[41] E. Guérin & M. Wemaere, *Négociations climat. Compte-rendu de Barcelone*, Paris, IDDRI, 2009, p. 9.

[42] See for example Brazil's submission, in "Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties", Part I, Doc. FCCC/AWGLCA/2009/MISC.4 (Part I), 19 May 2009, p. 54; China's submission, in ibid., p. 63; South Africa's submission, in "Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties", Part II, Doc. FCCC/AWGLCA/2009/MISC.4 (Part II), 19 May 2009, p. 95.

[43] M. Raman, "South opposed to North's proposals for new treaty in Copenhagen", *Third World Network Barcelona News Update*, #16, 12 November 2009, available at URL <http://www.twnside.org.sg/title2/climate/barcelona.news.021109.htm>.

[44] Draft Protocol to the Convention prepared by the Government of Japan for adoption at the fifteenth session of the Conference of the Parties, Doc. FCCC/CP/2009/3, 13 May 2009; Draft Protocol to the Convention prepared by the Government of Australia for adoption at the fifteenth session of the Conference of the Parties, Doc. FCCC/CP/2009/5, 6 June 2009; Draft Protocol to the Convention presented by the Government of Tuvalu under Article 17 of the Convention, Doc. FCCC/CP/2009/4, 5 June 2009; Draft Protocol to the Convention prepared by the Government of Costa Rica for adoption at the fifteenth session of the Conference of the Parties, Doc. FCCC/CP/2009/6, 8 June 2009; Draft Implementing Agreement under the Convention prepared by the Government of the United States of America for adoption at the fifteenth session of the Conference of the Parties, Doc. FCCC/CP/2009/7, 6 June 2009.

[45] On the US resistance to enter into binding emission reduction commitments and for a comparison of the US and EU climate policies, see Jutta Brunnée, "Europe, the United States, and the Global Climate Regime: All Together Now?", 24 *J. Land Use & Envtl. L.*, pp. 1-43.

developing—countries choose to withdraw from the Kyoto system, as provided for in Article 27 of the Kyoto Protocol. On the other hand, the renegotiation of the whole climate change international legal regime in order to *possibly* secure the US engagement "*requires a leap of faith for the* [G77/China] *which may be a leap of faith too far*"[46].

It is indeed vey likely that a new agreement will drop the top-down approach in favor of a bottom-up structure. The most radical position in favor of the latter is offered by the US proposition, the outlines of which can be sketched as follows: Parties no longer negotiate their QELROs within a collective framework; the post-2012 system will be limited to the registration of developed countries commitments and developing countries actions, which will be defined and specified by national law and policies; flexibility mechanisms and the allocation of emission allowances would also be regulated by domestic legislation and; compliance control would be made on the basis of self-reporting[47].

IV. Sectoral approaches and sectoral agreements, the "second-best solution"

The Bali Action Plan requests the Parties to consider the use of "*sectoral approaches and sector-specific actions, in order to enhance implementation of Article 4, paragraph 1(c), of the Convention*"[48]. Sectoral approaches were first imagined, in particular in the works of the International Energy Agency, in relation with a few sectors which consume a lot of energy (aluminium, steel and cement industries) and which share specific features: "*concentration of*

[46] L. Rajamani, "The "Cloud" over the Climate Negotiations: From Bangkok to Copenhagen and Beyond", *CPR Climate Brief*, October 2009, p. 4.
[47] Non-paper 28 available at URL <http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/5012.php>.
[48] Point 1 b) (iv). Article 4.1 c) of the UNFCCC reads as follows: "[All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall] *c) Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors*".

ownership, high levels of trade and significant scope to reduce emissions through known technologies"[49]. They were then extended to other sectors, mainly electricity generation, buildings and transport infrastructure and, in the framework of the negotiation of a post-2012 legal regime, they are seen as a way to supplement the CDM and attract developing countries' participation.

The current global legal regime is built upon a founding dichotomy between Annex I and non-Annex I countries. In particular, one of the major bones of contention remains the commitments major emitting developing countries should or should not take on. Because they avoid setting absolute binding targets which affect the whole economy and because they can be linked to international support on capacity and technology, sectoral approaches could open a parallel negotiation track and accelerate the development and use of clean technologies in order to lessen the risk to lock-in carbon intensive investments, in sectors where emissions are already high and increasing[50]. In addition, they are welcomed by developed States which worry about the risk of carbon leakage and the loss of competitiveness of their industries, and also about the competitive advantages gained by developing countries which are not subjected to caps[51]. Sectoral approaches thus arouse high expectations, potentially higher than it is sensible.

Firstly, sectoral approaches and sectoral agreements are not interchangeable concepts. Concerned industries are favorable to sectoral approaches which can help exchanging

[49] C. Watson, J. Newman, R. Hon Simon Upton, P. Hackmann, *Can Transnational Sectoral Agreements Help Reduce Greenhouse Gas Emissions?*, Paris, OECD, Doc. SG/SD/RT(2005)1, 2005, p. 35.
[50] D. Bodansky, *International Sectoral Agreements in a Post-2012 Climate Framework. A Working Paper*, Arlington, Pew Center on Global Climate Change, 2007, pp. 5-6.
[51] OECD, *The Economics of Climate Change Mitigation: Policies and Options for Global Action Beyond 2012*, Paris, OECD, 2009, p. 19; M. Colombier & E. Guérin, *Sectoral Agreements*, Breaking the Climate Deadlock briefing paper, The Climate Group, 2008, p. 6, available at URL <http://www.iddri.org/Publications/Publications-scientifiques-et-autres/0807_Briefing-Paper-Climate-Group_Sectoral_Agreements.pdf>.

information on good practices, diffusing best available technologies etc. Some industry-to-industry initiatives, such as the Cement Sustainability Initiative, go even further by setting voluntary standards which actually aim at reducing GHG emissions. As for developing countries, they link sectoral approaches to UNFCCC Article 4.1 c) on transfer of technologies, practices and processes and to UNFCCC Article 4.7[52]. Japan, a historical spearhead of the inclusion of sectoral approaches in the negotiations, defends the idea in order to first, calculate potential emission reductions, second, measure the comparability of efforts and, third, build technological exchange platforms[53]. With regard to the "Sustainable Development Policies and Measures" (SD-PAMs) promoted by South Africa, sectoral approaches could also be useful to gain recognition of domestic sustainable development initiatives[54].

Sectoral "agreements" infer to some extent a legal nature. Several typologies were drawn up[55] but they hardly distinguish between approaches and agreements. Broadly, sectoral agreements can be either horizontal or vertical. Horizontal agreements would be concluded between governments in order to institutionalize and organize technology transfers, financing or capacity building in specific sectors. Vertical sectoral agreements are agreements signed

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[52] "*The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology*". Note that China's position at the Accra meeting (August 2008), according to which sectoral approaches should be considered exclusively within the perspective of technology transfers, relaxed on the matter: E. Guérin, "Quick Overview of the General State of Play of UNFCCC Negotiations after Poznan", *IDDRI Policy Brief*, no. 9, 2008, p. 3, available at URL <http://www.iddri.org/Publications/Collections/Syntheses/PB_0809_E-Guerin_Overview-UNFCCC-Negotiations-after-Poznan.pdf>.

[53] Japan's submissions, in "Ideas and proposals on the subjects of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention workshops scheduled for 2008", Doc. FCCC/AWGLCA/2008/MISC.4, 14 August 2008, pp. 8-16.

[54] M. Colombier & E. Guérin, *Sectoral Agreements*, Breaking the Climate Deadlock briefing paper, The Climate Group, 2008, p. 9, available at URL <http://www.iddri.org/Publications/Publications-scientifiques-et-autres/0807_Briefing-Paper-Climate-Group_Sectoral_Agreements.pdf>.

[55] See ibid.; R. Bradley and al., *Slicing the Pie. Sector-based Approaches to International Climate Agreements. Issues and Options*, Washington DC, World Resources Institute, 2007, pp. 9-12; Pew Center on Global Climate Change, "Background Note: Sectoral Approaches in a Post-2012 Climate Framework", March 2008, available at URL <http://www.pewclimate.org/docUploads/Sectoral-Background.pdf>.

between governments and their industries which can for example condition access to subventions or tax cuts to the use of clean technologies.

Secondly, studies on the benefits generated by the use of sectoral approaches / agreements stress the fact that sectoral approaches will always remain a second-best solution, for they are not a substitute to comprehensive policies or absolute binding targets for developed countries[56] and they do not have the environmental efficiency potential of an international agreement. They should indeed be seen more like door-openers than like solutions in themselves. In order to contribute to the reduction of GHG emissions in the post-2012 context, sectoral approaches / agreements must be implemented in a carefully negotiated global legal framework, failing which efforts will probably spread to thinly, their comparability will not be ensured and their contribution to sustainable development will not be measurable, reportable and verifiable. Also, they must not become an "*insuperable negotiating burden*"[57] by increasing unnecessarily the number of negotiation tracks and the technical nature of issues to be discussed.

V. MRV: Opening the verification and control Pandora's Box

The issue of verification and compliance control is another hotspot of the Copenhagen negotiations. Paragraphs 1 b) (i) and 1 b) (ii)[58] of the Bali Action Plan introduce in this respect a new expression: "*measurable, reportable and verifiable*", which qualifies how

[56] R. Bradley & al., *Slicing the Pie. Sector-based Approaches to International Climate Agreements. Issues and Options*, Washington DC, World Resources Institute, 2007, p. v; M. Colombier & E. Guérin, *Sectoral Agreements*, Breaking the Climate Deadlock briefing paper, The Climate Group, 2008, p. 9, available at URL <http://www.iddri.org/Publications/Publications-scientifiques-et-autres/0807_Briefing-Paper-Climate-Group_Sectoral_Agreements.pdf>.
[57] Ibid., p. 12.
[58] Paragraphs (i) and (ii) are reproduced above in this article.

should be both the "*nationally appropriate mitigation commitments and actions*" by developed countries and the "*nationally appropriate mitigation actions*" (NAMAs) by developing countries. The wording of Paragraph 1 b) (ii)[59] also makes arguable that it applies to the provision of "*technology, financing and capacity-building*" by developed to developing Parties[60].

The potential impact of the "measurement, reporting and verification" (MRV) approach for the evolution of the current verification & compliance system must be envisaged in two sequences. First, MRV operate *ex ante*, at the stage of the adoption of NAMAs, for example by setting the rules related to their registration. Second, *ex post*, the relationships between MRV and a compliance control system need to be vigorously clarified.

Concerning MRV of the NAMAs at the registration stage, developed countries propose all developing countries, except the least developed countries group, adopt long-term low carbon strategies[61] with emission reduction targets by 2050 and list their efforts to reach their targets. Some propositions also demand that developing countries register all climate-friendly actions they take, whether self-financed or internationally supported, along with the matching expected quantified emission reductions. A few days before the beginning of COP15, China and India reiterated that they are not committed to announce quantified emission reduction targets and that they will only register mitigation actions which require international financial or technical support.

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[59] "*(ii) Nationally appropriate mitigation actions by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner;*".

[60] For a detailed discussion on this point see L. Rajamani, "From Berlin to Bali and Beyond: *Killing Kyoto Softly?*", *ICLQ*, vol. 57, October 2008, pp. 933-935.

[61] Low carbon strategy is the terminology used by the US. The European Commission uses the expression "low carbon development strategies", Australia mentions "low emission development strategy" and Japan refers to "national action plans": see K. K. Dubash, "Will Low Carbon Growth Plans Helps or Hurt Low Carbon Growth?", *CPR Climate Brief*, November 2009, p. 3.

As far as the form of the registration is concerned, South Korea advocates for an international registry limited to NAMAs; South Africa supports the idea and wants the process to be based on a voluntary registration[62]. Australia is favorable to a registration system, common to both the developed countries' commitments & actions and NAMAs, which draws on the "schedule" system of the World Trade Organization[63].

As far as the *ex post* aspect of MRV is concerned, opposite views clash. The UNFCCC and the Kyoto Protocol provide for complex monitoring, verification and compliance procedures[64]. As far as monitoring and, partly, verification are concerned, a MRV approach could supplement existing systems in their weakest points[65] and offer solutions if the developing major emitter country category is created. However, there is one area where the MRV approach seems a far less ambitious option than the existing: compliance control. The compliance control system of the Kyoto Protocol, adopted through a COP decision and endorsed by the first COP/MOP[66], is considered to be the most advanced and sophisticated of its kind. The guarantor of the Protocol's implementation consists in a body, the Compliance Committee, whose mission is twofold. Its facilitative branch aims to provide advice and assistance to Parties in order to promote compliance. Its enforcement branch has the

[62] Republic of Korea's submission, in "Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties", Part II, Doc. FCCC/AWGLCA/2009/MISC.4 (Part II), 19 May 2009, p. 78; South Africa's submission, in ibid., p. 97.
[63] Australia's submission, in "Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties", Part I, Doc. FCCC/AWGLCA/2009/MISC.4 (Part I), 19 May 2009, p. 22.
[64] For a description of the monitoring and verification procedures in the UNFCCC and the Kyoto Protocol, see C. Breidenich & D. Bodansky, *Measurement, Reporting and Verification in a Post-2012 Climate Agreement*, Arlington Pew Center on Global Climate Change, 2009, pp. 11-17; on the details of the Kyoto Protocol's monitoring, verification and compliance procedures see S. Maljean-Dubois ed., *Changements climatiques : les enjeux du contrôle international*, Paris, La Documentation française, 2007, 383 p.
[65] C. Breidenich & D. Bodansky, *Measurement, Reporting and Verification in a Post-2012 Climate Agreement*, Arlington Pew Center on Global Climate Change, 2009, pp. 11-17.
[66] Decision 24/CP.7, "Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol", Doc. FCCC/CP/2001/13/Add.3, 21 January 2002 and Decision 27/CMP.1, "Procedures and mechanisms relating to compliance under the Kyoto Protocol", Doc. FCCC/KP/CMP/2005/8/Add.3, 30 March 2006.

responsibility to determine consequences for Parties not meeting their commitments. The Compliance Committee can consider questions of implementation which can be raised by expert review teams under Article 8 of the Protocol, any Party with respect to itself, or a Party with respect to another Party. And it just started to issue decisions. Following an implementation question raised by an expert review team and related to non-compliance with reporting requirements, Greece was declared to be in non-compliance and consequently "sentenced" to non-eligibility to participate in the emissions trading system and in project mechanisms[67]. So was Croatia very recently[68].

The question is then whether the compliance system will survive the changes ahead. On the one hand, developing countries see the compliance control system as one of the pillars of the Kyoto Protocol and refuse to see it discarded. On the other hand, the US has always opposed an international sanction mechanism. Non-paper 28 eliminates such a compliance control system in favor of much poorer verification process, under which "*National inventories and the information reported under paragraph 4* [implementation progress as reported by the Party] *will be subject to regular independent review by an expert panel*". The expert panel's assessment will then be submitted to the Subsidiary Body for Implementation and to other Parties' comments. The country review report will finally be forwarded to the COP "*for its consideration*". However, other developed States including Australia[69], Japan[70]

[67] Enforcement Branch of the Compliance Committee, Final Decision – Party concerned: Greece, Doc. CC-2007-1-8/Greece/EB, 17 April 2008. Greece's eligibility was reinstated a few months later, after proving it had adopted sufficient corrective measures: Enforcement Branch of the Compliance Committee, Decision Under Paragraph 2 of Section X – Party concerned: Greece, Doc. CC-2007-1-13/Greece/EB, 13 November 2008. On the first decisions of the facilitative branch and the enforcement branch, see S. Maljean-Dubois, "Le Comité de contrôle du Protocole de Kyoto rend ses premières décisions", *Droit de l'environnement*, no. 62, October 2008, pp. 11-15.

[68] Enforcement Branch of the Compliance Committee, Final Decision – Party concerned: Croatia, Doc. CC-2009-1-8/Croatia/EB, 26 November 2009.

[69] Draft protocol to the Convention prepared by the Government of Australia for adoption at the fifteenth session of the Conference of the Parties, Doc. FCCC/CP/2009/5, 6 June 2009, p. 17.

[70] Draft Protocol to the Convention prepared by the Government of Japan for adoption at the fifteenth session of the Conference of the Parties, Doc. FCCC/CP/2009/3, 13 May 2009, p. 16.

and the EU[71] do not intend to negotiate a new agreement which would not encompass a compliance control system.

CONCLUSION

The Bali Action Plan raises of course many issues which are not addressed in this paper or are only mentioned there in passing. The Copenhagen summit has all the necessary ingredients to constitute an historic turn in the design of the future climate change framework, which may go either on the right or wrong direction, and right or wrong direction depends on where the Parties stand. The views and expectations of developed Parties and developing Parties are not irreconcilable, but it will take strong political will to make the concessions necessary to a reach a fair balance. The die is not cast yet.

7 December 2009

[71] Council of the European Union, "EU position for the Copenhagen Climate Conference (7-18 December 2009)", Brussels, 21 October 2009, available at URL <http://register.consilium.europa.eu/pdf/en/09/st14/st14790.en09.pdf>, p. 23.